85-1884

No. .....

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

HUNT INTERNATIONAL RESOURCES CORPORATION, GREAT WESTERN UNITED CORPORATION, THE GREAT WESTERN SUGAR COMPANY, WESTERN INVESTMENT COMPANY, N. BUNKER HUNT AND W. HERBERT HUNT,
Petitioners,

VS.

W. C. AND KENNETH STREY, a partnership on behalf of itself and all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May 13, 1986

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QUESTION PRESENTED

Where it is determined to a legal certainty that a plaintiff cannot recover punitive damages, can his prayer for punitive damages nevertheless be counted toward satisfying the amount in controversy requirement for diversity jurisdiction?

PARTIES TO THE PROCEEDINGS

Petitioners are Hunt International Resources Corporation, Great Western United Corporation, The Great Western Sugar Company, Western Investment Company, N. Bunker Hunt and W. Herbert Hunt, all included in the caption. Petitioners have no further parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1. Respondent W. C. and Kenneth Strey, a partnership, represents a class of approximately 3,000 sugarbeet growers residing in Colorado, Kansas, Nebraska, Wyoming and Montana.

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Petitioners,

VS.

W. C. and KENNETH STREY, a partnership on behalf of itself and all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, defendants below, petition this Court to issue a writ of certiorari to review the decision of the Tenth Circuit Court of Appeals filed on December 4, 1984 which held that, in a class action, the district court had diversity jurisdiction over claims of class members with less than $10,000 actual damages in controversy. In an opinion at odds with the opinions of this Court and other circuits, the Court of Appeals held that plaintiff's prayer for $250 million in punitive damages could be counted in determining the amount in controversy although holding, as a matter of law, that no punitive damages could be recovered at trial. A Petition for Rehearing and a Peti-

tion for Rehearing *En Banc* were denied on February 12, 1986.

OPINIONS BELOW

The pertinent order of the District Court for the District of Colorado was orally delivered in open court and is appended at A-1. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 749 F.2d 1437 (10th Cir. 1984) and is appended at A-2. The Order denying the Petition for Rehearing and Petition for Rehearing *En Banc* is unpublished and is appended at A-3.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment on December 4, 1984. A timely Petition for Rehearing and Rehearing *En Banc* was denied on February 12, 1986. This Petition was filed within ninety days of the denial of rehearing in accordance with 28 U.S.C. § 1254(1) and 28 U.S.C. § 1201(c). The district court asserted jurisdiction below under 28 U.S.C. § 1332(a)(1) over claims of all class members who had $10,000 in controversy when taking into account plaintiff's prayer for $250 million in punitive damages. Defendants contested jurisdiction as to class members who had less than $10,000 actual damages in controversy — approximately two-thirds of the class — on the ground that punitive damages could not be recovered as a matter of law and, accordingly, should not be counted toward satisfying the amount in controversy requirement.

STATUTE INVOLVED

28 U.S.C. § 1332(a)(1) provides in pertinent part as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —
>
> (1) Citizens of different States; . . . .

STATEMENT OF THE CASE

This action concerns the 1974 sugarbeet contracts under which The Great Western Sugar Company ("GWS") purchased sugarbeets from approximately 3,000 sugarbeet growers residing in Colorado, Kansas, Nebraska, Wyoming and Montana. Under the sugarbeet contracts, the price paid by GWS to sugarbeet growers for the sugarbeets is based in part on the average net return obtained by GWS on sales of refined beet sugar in the marketing year following the harvest. Under the formula in the sugarbeet contracts, the growers receive approximately 62% of the net return obtained by GWS on sales of refined beet sugar.

This class action suit was filed in the United States District Court for the District of Colorado in May 1978. At trial, the named plaintiff asserted three principal claims for relief: (1) breach of contract; (2) breach of an implied contractual duty of good faith and fair dealing; and (3) breach of fiduciary duty. The claim for breach of contract alleged that $61 million in profits made by defendants through short positions on the raw cane sugar futures market should have been counted in calculating the price to be paid by GWS to the growers under the sugarbeet contracts. Plaintiff alleged that the growers

were entitled to 62% of the futures trading profits or $38 million.

In the claim for breach of an implied contractual covenant of good faith and fair dealing, plaintiff alleged that GWS had failed to sell its beet sugar inventory in good faith, and had failed to maximize the net return from the sale of sugar. Plaintiff argued in essence that GWS had not sold the refined sugar at the best times of the year. On this claim, plaintiff sought $17 million in damages on the theory that GWS should have matched the higher average net return obtained by one of several competing sugar companies.

In the claim for breach of fiduciary duty, plaintiff alleged that the sugarbeet contracts gave rise to a fiduciary relationship. Plaintiff claimed that defendants' futures trading constituted an inherent conflict of interest because it allowed defendants to profit from declining sugar prices. On this claim, plaintiff sought disgorgement of all $61 million in futures trading profits, plus $250 million in punitive damages. Plaintiff sought punitive damages *only* on the claim for breach of fiduciary duty.

Plaintiff alleged diversity jurisdiction under 28 U.S.C. § 1332 and federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337. Federal question jurisdiction was premised on plaintiff's claim for violation of the Commodity Exchange Act ("CEA"). 7 U.S.C. § 6b. The district court dismissed the CEA claim early in the case as failing to state a claim for relief. Plaintiff had not alleged any fraud in connection with the making of trades on the futures markets, and the growers were not in the class of those whom Congress intended to protect under the CEA. Dismissal of the CEA claim left diversity of citizenship as the only basis for jurisdiction.

Defendants moved the district court to dismiss the claims of two-thirds of the class for lack of subject matter jurisdiction. Defendants demonstrated that, if the growers recovered the full amount of actual damages they sought and the judgment were allocated on a pro-rata basis among the growers, approximately two-thirds of the growers would recover less than the $10,000 amount in controversy required for diversity jurisdiction. Defendants also argued that a federal court class action was not a "superior method for adjudicating the controversy" under Rule 23(b)(3) of the Federal Rules of Civil Procedure because the district court lacked subject matter jurisdiction over the claims of a majority of the class.

Plaintiff acknowledged that most growers would recover less than $10,000 in actual damages even if plaintiff recovered all actual damages sought, but argued that the prayer for $250 million in punitive damages for breach of fiduciary duty should also be counted. If the growers recovered $250 million in punitive damages plus complete recovery of all actual damages alleged, then all growers would recover $10,000. Defendants countered that the prayer for $250 million in punitive damages was made in bad faith, solely for the purpose of acquiring federal jurisdiction. Defendants also argued that, as a matter of law, the sugarbeet contracts did not create a fiduciary relationship and, therefore, the claim for breach of fiduciary duty should be dismissed. In that event, only breach of contract claims would remain and no punitive damages could be recovered.

Acknowledging that each class member needed to satisfy the amount in controversy requirement, the district court nevertheless concluded that it would count the full claim for $250 million in punitive damages for that purpose. It rejected defendants' argument that the complaint

failed to state a claim for relief on which punitive damages could be awarded. Accordingly, the district court exercised jurisdiction over the claims of all growers who grew at least 10 acres of sugarbeets under a 1974 sugarbeet contract.

The case was tried to a jury which rendered a verdict for defendants on the breach of contract claim, finding that the growers had no contractual right to share in defendants' futures trading profits. The jury nonetheless found for the plaintiff class on the claims for breach of fiduciary duty and breach of an implied contractual duty of good faith and fair dealing. The jury awarded the class $11,813,748 in actual damages and $13,571,388 in punitive damages. The district court added an additional $5,909,808 in prejudgment interest — making a total of $31,294,944 — and entered judgment on the jury's verdict.

On appeal, the Court of Appeals in a unanimous opinion vacated the judgment and remanded for a new trial only on the claim for breach of an implied contractual duty of good faith and fair dealing. The Court of Appeals held that, as a matter of law, plaintiff had not stated any claim for breach of fiduciary duty and that the district court should have directed a verdict for defendants on that issue. 749 F.2d at 1440. The Court of Appeals reasoned that the sugarbeet contracts "were typical sales contracts with the ultimate price to be determined by post-sale events." 749 F.2d at 1439. Title to the sugarbeets passed to GWS on delivery, the growers had no ownership interest in the beets thereafter nor in the sugar, and the

growers were simply creditors of GWS for the purchase price. *Id.* The Court of Appeals concluded:

> The contract was, as mentioned, nothing more than a sales contract with a long used formula for the computation of price. GWS held no property of the plaintiffs, but was at most a creditor [SIC] for the unpaid portion of the sales price.

Id. at 1440.[1]

With respect to the claim for breach of an implied contractual duty of good faith, the Court of Appeals held that the district court had erroneously instructed the jury. Accordingly, it ordered a new trial on that claim alone.

Despite these holdings, the Court of Appeals rejected defendants' argument that the district court lacked subject matter jurisdiction over two-thirds of the class in light of the legal certainty that punitive damages were unavailable. Its reasoning on this issue was limited to the following:

> We hold that at the time the case was commenced the court had jurisdiction. An adjustment of the dollar figures during the proceedings did not divest the court of jurisdiction.
>
> Upon close scrutiny there is nothing to show that the punitive damages claim was not made in good faith under *St. Paul Mercury Indemnity Co. v. Red*

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[1]In addition, the Court of Appeals noted that the plaintiff stipulated before trial that it had no evidence that defendants' futures trading had any effect on the cash market for sugar and that it had no evidence that GWS pricing decisions had any effect on the futures market. The futures trading thus presented no conflict of interest. *Id.* at 1439-40.

Cab Co., 303 U. S. 283, 58 S. Ct. 586, 82 L.Ed. 845; *Palmer v. A. H. Robins Co., Inc.* 684 P.2d 187 (Colo.).

749 F.2d at 1441. The case has been remanded to the district court which has scheduled a retrial for March 9, 1987 — a retrial at which, even if plaintiff recovered its entire prayer for relief, approximately two-thirds of the class members will not recover $10,000.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE TENTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS ON AN IMPORTANT AND RECURRING QUESTION OF FEDERAL JURISDICTION

In essence, the Tenth Circuit Court of Appeals decided in this case that, because plaintiff was in subjective good faith in advancing the legal argument that the sugarbeet contract created a fiduciary relationship, the court could count the accompanying prayer for punitive damages for purposes of calculating the amount in controversy even though the Court of Appeals had rejected plaintiff's legal argument and had determined, as a matter of law, that the sugarbeet contract did not give rise to any fiduciary duty and no punitive damages could be recovered.

This holding misapplies this Court's precedents on an important issue of federal jurisdiction and is in conflict with the decisions of other Courts of Appeals. The Tenth Circuit's approach is an open invitation to use invalid punitive damage claims to force what are essentially state court actions into federal court.

In *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), the Court established the following rules for determining whether the amount in controversy re-

quirement for diversity jurisdiction has been satisfied. First, where "from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed," the suit should be dismissed for lack of jurisdiction. 303 U.S. at 289. Further, where "from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount," the suit must also be dismissed for lack of jurisdiction. *Id.* Finally, if it is not possible to determine to a "legal certainty" that the plaintiff cannot recover the jurisdictional amount, the district court has jurisdiction so long as the plaintiff's claim is made in "good faith." *Id.* As the Court stated,

> unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith.

303 U.S. at 288. Resort to a "good faith" assessment is thus necessary only when "legal certainty" is not present.

The proper application of the Court's holding in *St. Paul* is exemplified by *Wiggins v. North American Equit. Life Assurance Co.*, 644 F.2d 1014 (4th Cir. 1981). There, the plaintiff brought suit for $9,000 in actual damages allegedly due her under a title insurance policy. She also sought $100,000 in punitive damages for the insurance company's alleged bad faith in refusing to pay her claim.

The district court held that punitive damages were unavailable under the applicable state law, but retained jurisdiction over the case on the theory that the plaintiff's legal arguments to the contrary were made in good faith. On appeal after trial, the Fourth Circuit reversed, holding that the district court lacked jurisdiction because, "as a matter of 'legal certainty'," plaintiff never could have recovered punitive damages. 644 F.2d at 1018. The fact

that the plaintiff may have been in subjective good faith in arguing that state law allowed the recovery of punitive damages was irrelevant:

> [W]hile good faith is a salient factor, it alone does not control, for if it appears to a legal certainty that the plaintiff could not recover the jurisdictional amount, the case will be dismissed for want of jurisdiction. . . .

644 F.2d at 1017 (*quoting McDonald v. Patton*, 240 F.2d 424, 426 (4th Cir. 1957)).[2]

Some courts have noted the particular importance of applying the legal certainty test in cases where, as here, plaintiff relies on punitive or exemplary damages to attain the jurisdictional amount. As the Court of Appeals for the District of Columbia Circuit has stated:

> In applying the legal certainty test where the availability of punitive damages is the sine qua non of federal jurisdiction the District Court should scrutinize the punitive damage claim to ensure that it has at least a colorable basis in law *and* fact. *See Zahn v. International Paper Co.*, 469 F.2d 1033 n.1 (2d Cir.

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[2] *Accord Nixon v. Loyal Order of Moose Lodge No. 750*, 285 F.2d 250 (4th Cir. 1960). *See also Burns v. Anderson*, 502 F.2d 970, 971-72 (5th Cir. 1974) (Federal courts must not "function as small claims courts"; trial judge must dismiss case if claim is for less than $10,000 as matter of law); *Wood v. Citronelle-Mobile Gathering System Co.*, 409 F.2d 367 (5th Cir. 1968) (case must be dismissed where punitive damages essential to meeting jurisdictional amount are unavailable as a matter of law); *Ringsby Truck Lines, Inc. v. Beardsley*, 331 F.2d 14, 18-19 (8th Cir. 1964) (exemplary damages unavailable as matter of law; case dismissed); *Morris v. Hotel Rivera, Inc.*, 704 F.2d 1113, 1115 (9th Cir. 1983) ("typical" case meeting legal certainty test is where "rule of law or measure of damages limits amount of damages recoverable").

> 1972), *aff'd,* 414 U.S. 291 (1973); *Nelson v. Keefer,* 451 F.2d 289, 293-93 (3d Cir. 1971). Liberal pleading rules are not a license for plaintiffs to shoehorn essentially local actions into federal court through extravagant or invalid punitive damage claims.

Kahal v. J.W. Wilson & Assoc., Inc., 673 F.2d 547, 549 (D.C. Cir. 1982).

In contrast, the Tenth Circuit repeatedly has allowed district courts to assert jurisdiction over cases despite the legal certainty that the plaintiff cannot recover the requisite amount in controversy. Misapplying the "good faith" test to the exclusion of "legal certainty," the Tenth Circuit has held that a district court had jurisdiction even where it is determined as a matter of law that the plaintiff cannot recover $10,000 — if the plaintiff's rejected legal arguments to the contrary were made in subjective good faith. The Tenth Circuit's approach encourages the manufacture or inflation of punitive damage claims to bootstrap what are essentially local actions into federal court.

The present case is only the most recent in a series of cases in which the Tenth Circuit has misapplied the "good faith" test. In *Farmers Elevator Mutual Insurance Co. v. Jewett,* 394 F.2d 896, 898 (10th Cir. 1968), for example, the Tenth Circuit turned the rule on its head, reasoning that jurisdiction was present because "we cannot say to a 'legal certainty' that 'good faith' was lacking . . . ." In *Craig v. Champlin Petroleum Co.,* 421 F.2d 236 (10th Cir. 1970), lease holders brought a class action for amounts allegedly due under oil and gas leases based on a claim that the lessor had not properly marketed the oil extracted under the leases. The claims of individual class members were for amounts less than $10,000, but plaintiff had amended the complaint to seek cancellation of the leases, each of which had a value in excess of $10,000. The

district court determined that, as a matter of law, lease cancellation was not a proper remedy for the lessor's alleged failure to market properly, but nevertheless upheld diversity jurisdiction. On appeal, the Court of Appeals affirmed on the ground that the royalty owners had been in good faith in advancing the legal argument that lease cancellation was an appropriate remedy. 421 F.2d at 240.[3]

The Tenth Circuit's confusion over the applicable standard is most apparent in its opinion in the present case. Here, as noted *supra*, plaintiff alleged that defendants had a fiduciary duty to sugarbeet growers arising out of their contractual relationship. The complaint prayed for $250 million in punitive damages on the fiduciary duty claim — an amount approximately eight times the prayer for actual damages. The punitive damage allegation on

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[3]Decisions of the Sixth Circuit appear also to allow federal courts to assert diversity jurisdiction based on a claim for punitive damages even where it is legally certain that a plaintiff cannot recover punitive damages, providing the court decides that plaintiff's legal argument was made in subjective good faith. *See Lewis v. Cook*, 409 F.2d 619 (6th Cir. 1969) (jurisdiction will not attach only where claim made merely for purpose of conferring jurisdiction); *Scottish Union v. National Ins. Co. v. Bejcy*, 201 F.2d 163 (6th Cir. 1953) (court finds jurisdiction because plaintiffs had a "good faith reasonable expectation" when case filed despite fact that they were wrong, as a matter of law); *Calhoun v. Kentucky-West Virginia Gas Co.*, 166 F.2d 530 (6th Cir. 1948) (court finds jurisdiction without resolving legal question because at the time of filing there was "room for the inference" that requisite damages were available). *See also Worthams v. Atlanta Life Ins. Co.*, 533 F.2d 994 (6th Cir. 1976) (case not dismissed despite legal certainty that jurisdictional amount could not be recovered because claim "not revealed to be clearly colorable from an examination of the complaint itself.") *Cf. Sellars v. O'Connell*, 701 F.2d 575 (6th Cir. 1983) (dissent).

the fiduciary duty claim was essential to obtaining federal jurisdiction.

In the district court, defendants had argued that Colorado law did not recognize any fiduciary relationship arising from an ordinary commercial contract and that, in any event, the plaintiff had inflated the punitive damage claim so as to obtain federal jurisdiction. On these grounds, defendants moved for dismissal of the action as to growers with less than $10,000 actual damages in controversy (about two-thirds of the class). The district court rejected these arguments and allowed the case to proceed as to the entire class. On appeal, the Tenth Circuit reversed, holding that Colorado law did not recognize a fiduciary duty arising out of an ordinary commercial contract. Despite ruling that the class therefore could not recover punitive damages, the Court of Appeals nonetheless allowed the class to use the punitive damage claim to make its way into federal court on the remaining breach of contract claim because of plaintiff's "good faith" in advancing the legally incorrect claim.

This anomalous result is also at odds with this Court's ruling in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). There the Court held that in a class action for damages each class member must satisfy the amount in controversy requirement. The court specifically held that "any plaintiff without the jurisdictional amount must be dismissed." 414 U.S. at 300.

The decision below circumvents the "legal certainty" and "good faith" tests as established in *St Paul Mercury Indemnity Co. v. Red Cab Co.* and adhered to by most Courts of Appeals. This Court has never suggested that, so long as a plaintiff makes a good faith legal argument for punitive damages, the prayer for punitive damages can be counted toward jurisdiction even if the court

determines, as a matter of law, that plaintiff has stated no valid claim for such damages. Unless corrected by this Court, the Court of Appeals' ruling will remain an open invitation for plaintiffs to use legally invalid punitive damage claims to "shoehorn" their state law actions into federal court. At a time when federal courts are burdened with ever-expanding caseloads, such misuse of federal diversity jurisdiction should not remain unchecked.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 13, 1986

Respectfully Submitted,

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APPENDIX A-1

Case No.: D.C. No. 78-Z-0450

DISTRICT COURT OPINION RE: JURISDICTION

REPORTER'S TRANSCRIPT

(Hearing on class certification)

Proceedings before the Honorable Zita L. Weinshienk, Judge, United States District Court for the District of Colorado, May 8, 1980, United States Courthouse, Denver, Colorado.

(Transcript, pp. 96-98)

Page 96:

* * *

On the question of the $10,000 limitation, I would have to agree with the defendants that the *Zahn* case, although it talks about a (b)(3) action, probably philosophically covers class actions including (b)(1)'s; and therefore, the *Zahn* decision as held by Judge Winner in the *Davis* case, does require that each member of the class have a claim of $10,000 or more. It also, at least by implication, indicates that there is no ancillary jurisdiction for those with lesser claims; so the question in this case gets down to the punitive damages and whether they are proper parts of the claim and whether these claims bring the amounts of the individual class members over the $10,000 requirement.

I can't go into the facts at this time as to whether this is a proper punitive-damage claim or not. I would not even dare to try to guess before hearing evidence whether there is a proper claim. I certainly do not have that type of legal certainty that was discussed in one of the cases that there is no punitive-damage claim in this case. I do

not have a legal certainty that there is no punitive-damage claim in this case.

* * *

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* * *

Therefore, the decision of the punitive-damage claim in this case does allow at least the *prima-facie* showing of the statutory amount of $10,000 as to everyone that has ten acres or more, and that takes care of that jurisdictional question.

Whether punitive damages can be maintained when we get into the facts is something that I am not going to speculate about at this time.

APPENDIX A-2

W.C. and KENNETH STREY, a partnership, on behalf of itself and all others similarly situated, Plaintiffs, Appellees, Cross-Appellants,

v.

HUNT INTERNATIONAL RESOURCES CORPORATION, a Delaware corporation; Great Western United Corporation, a Delaware corporation; the Great Western Sugar Company, a Delaware corporation; Western Investment Company, a Delaware corporation; N. Bunker Hunt and W. Herbert Hunt, Defendants, Appellants, Cross-Appellees.

Nos. 84-1344, 84-1398.

United States Court of Appeals,
Tenth Circuit.

Dec. 4, 1984.

Before SETH, BREITENSTEIN and DOYLE, Circuit Judges.

SETH, Circuit Judge.

The plaintiffs herein are several thousand sugar beet growers who had entered into contracts wiht Great Western Sugar (GWS) for the sale of their beet crop. The growers are organized into regional growers' associations. Sales contracts would be negotiated each year whereby the growers agreed to deliver and sell their crop to GWS. There was no continuing year to year obligation on either party and the record shows that the growers increased or decreased the portion of their land they wished to plant in beets from year to year or raised none at all. On delivery of beets to GWS by the growers the sale was completed and the seller was paid a portion of the ultimate price.

His beets were tested for sugar content on delivery. The balance of the purchase price was paid by GWS at the end of its sales year for refined sugar. The total contract price was fixed by a formula which determined the "average net return" to GWS on sales of its refined sugar for the sales period. There were historically derived deductions and factors in the formula for the price determination. No issue is presented as to the formula.

The sales contracts recite that the growers are independent contractors. The record demonstrates, and the witnesses acknowledged, that the growers were creditors of GWS for the balance of the purchase price, that title to the sugar beets passed to GWS on delivery, and that the growers had no ownership in the beets thereafter nor in the sugar.

The contracts were typical sales contracts with the ultimate price to be determined by post-sale events. Such contracts which depend for pricing upon market prices at an agreed future date or upon profits or returns to one of the parties are not unusual. Such agreements are common in the oil and gas business, in store leases, and licensing agreements.

There was a change in the ownership of Great Western Sugar about the time the sugar beet crops were delivered to the plants under the contracts in question. The new owners decided to engage in trading in the futures market for sugar and other products and metals. GWS, the individuals, and a new corporation traded actively in the futures market.

The plaintiffs in this action seek to participate in the sugar futures profits of defendants which resulted but not in losses. A right of participation is advanced in three main claims in the complaint. They claim that the right to

participate arose under the provisions of the contracts although not therein mentioned. They claimed that the sales contract placed a fiduciary duty on GWS to the plaintiffs. The third general claim was based on an implied duty of defendants to perform under the contract in good faith.

The plaintiffs thus claimed that under the sales contract they were entitled to a percentage of profits made by defendants in then futures trading in sugar. This claim was advanced as a right under the term of the contract. The jury however decided that no such rights could be derived from the contracts. This determination was not appealed by the plaintiffs. The futures profits were thus not to be used in the calculation of "average net return." Also, no issue remains, as was advanced by the plaintiffs, that defendants misrepresented to plaintiffs that there was no such right under the contract.

The case concerns a period when there were large fluctuations in the price of sugar with record highs. There was much testimony as to whether GWS should have hedged the inventory in the futures market to protect its future sugar sales. Also, testimony as to what would have been a hedge in these circumstances was introduced as was testimony as to whether the contracts would have permitted hedging. Hedging had never been done by GWS. There was testimony that the growers through their several organizations reached a decision, expressed to GWS, that they as growers did not want to engage in sugar futures trading in view of possible losses.

The witnesses for plaintiffs testified that GWS should have entered the futures market to hedge the inventory. The witnesses for the defendants testified that it was their view that this could not be done because the growers

could not be required under the contracts to share possible losses.

The contracts provided for certain deductions to arrive at "net average return," as above mentioned, and it is questionable whether losses from hedging could have been included.

As mentioned, the jury concluded that participation in futures trading was not provided for in the contract. Hedging in the context in which it here arose is but an aspect of futures trading. The growers did not seek to negotiate a contract which would have included futures trading and, as mentioned, decided not to participate.

One of the basic positions that both parties took going into the trial was expressed in a stipulation that in substance provided that defendants' trading in sugar futures did not affect the cash market for sugar, and GWS pricing decisions had no effect on the futures market. The accuracy of this stipulation was borne out by testimony at trial. The stipulation placed a significant limitation on the contentions of plaintiffs or suggestion that there was some conflict of interest in the defendants' futures trading and the cash sales by GWS.

The plaintiffs also argued as a separate claim, and the trial court took the position, that the sales contracts created a fiduciary duty on the part of GWS to the plaintiffs. The jury included in its award of damages an element for the breach of such a duty. However, the contract provisions do not create a fiduciary duty and the evidence showed that none otherwise existed. The contract was, as mentioned, nothing more than a sales contract with a long used formula for the computation of price. GWS held no property of the plaintiffs, but was at most a creditor for the unpaid portion of the sales price.

GWS had the same interest in the "average net return" as did the plaintiffs.

As mentioned, the parties stipulated that the futures trading by defendants had no effect on the cash market for sugar and GWS pricing decisions had no effect on the futures market. There was demonstrated no conflict of interest on the part of defendants as to the futures trading.

We must conclude that the sales contract created no fiduciary duty on the part of GWS and none arose from the practices followed by the parties. The trial court should have granted the motion of defendants for a directed verdict on this claim. Both parties moved for a directed verdict on this issue.

As mentioned, the decisions in oil and gas cases in comparable situations hold that a fiduciary duty is not created. *See 19th Oil and Gas Institute Southwest Legal Foundation,* 165 at 179; *Garfield v. True Oil Co.,* 667 F.2d 942 (10th Cir.); *Craig v. Champlin Petroleum Co.,* 435 F.2d 933 (10th Cir.). There is nothing in the contract to create a fiduciary duty or confidential relationship. GWS, as mentioned, had no property of the plaintiffs nor was it "handling" property of the plaintiffs.

Special interrogatories were used and the jury was asked to answer on the three basic claims and to assess damages. The jury so found for defendants on the breach of contract claim, as mentioned. It found for plaintiffs on the claim of breach of an implied duty of good faith in the performance of the contract by GWS, and it found for plaintiffs on the claim of a breach of fiduciary duty.

Before the case went to the jury the parties stipulated that if the jury found for the plaintiffs on more than one claim the court in the entry of judgment would not add

the amounts but instead would enter judgment for the largest actual damage figure found by the jury on any claim. The jury awarded actual damages of $11,813,748 for the plaintiffs on the claim of breach of good faith and $11,459,335 on the fiduciary duty claim. The jury also awarded punitive damages against each defendant.

We have mentioned the disposition which must be made of the fiduciary duty claim. The jury decided the bare contract claim. There remains the claim based on a breach of the duty of good faith implied from the contract. This is the only surviving claim.

The plaintiffs under the good faith claim assert that the sugar was not sold at the best times in the sales year especially during periods of price declines. They also assert that there were delays in the execution of sales decisions imposed by the individual defendants.

The trial was necessarily a mixture of evidence on good faith and fiduciary duty. With the fiduciary duty claim excluded as it must be it is not possible to now consider the good faith claim separately. There is an additional problem arising from the trial court's instructions as to the measure of damages to be applied on the good faith claim. This instruction must be held to be in error. It advised the jury that it "may consider, among other things," the profits of GWS in its futures trading in the assessment of damages on the good faith claim. The use of "trading profits" as a factor in such damages introduced an extraneous factor — an erroneous element — in the determination as to what was necessary to place the damaged party in as good a position as he would have been had there been no breach of the implied good faith duty. *A to Z Rental, Inc. v. Wilson,* 413 F.2d 899 (10th Cir.) (applying Colorado law); *Intermountain Rural Elec-*

tric Ass'n v. Colorado Central Power Co., 322 F.2d 516 (10th Cir.).

The trading profits element was advanced as part of the breach of contract claim as to which the jury found against plaintiffs. It was not advanced as part of the implied good faith claim and was in fact no part of it. This was not a breach of fiduciary duty claim where such a special measure may be used. *Wilshire Oil Co. of Texas v. Riffe,* 381 F.2d 646 (10th Cir.); *Page v. Clark,* 197 Colo. 306, 592 P.2d 792.

In Colorado a definite distinction is made between contract and tort actions. There is no cause of action in tort for the breach of an implied duty under a contract. *Bloomfield Financial Corp. v. Nat'l Home Life,* 734 F.2d 1408 (10th Cir.). Tort recovery was denied in *Davis Cattle Co. v. Great Western Sugar Co.,* 544 F.2d 436 (10th Cir.).

There is an added uncertainty created by the jury in its award of damages. It appears, and both parties seem to acknowledge, that it added damages from the second and third claims. It is not possible to determine the result the jury intended. We pointed out this problem in our prior opinion. 696 F.2d 87. At this late date this uncertainty cannot be resolved on this substantial point by any reference to the original jury. There must be a new trial on the good faith claim.

On remand the trial court will have an opportunity to also reexamine the limitations and the pre-judgment interest issues. There exists under Colorado law, which makes a clear distinction between tort and contract claims, no basis for an award of punitive damages in a contract action absent the most egregious circumstances.

The Commodity Exchange Act issue was properly eliminated from the case by the ruling of the trial court.

The trial court permitted prejudgment interest on the basis that it would be permitted under Colorado law for a breach of a fiduciary duty. In view of our holding on the fiduciary duty claim the award of prejudgment interest must be set aside.

We hold that at the time the case was commenced the court had jurisdiction. An adjustment of the dollar figures during the proceedings did not divest the court of jurisdiction.

Upon close scrutiny there is nothing to show that the punitive damages claim was not made in good faith under *St. Paul Mercury Indemnity co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845; *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo.).

We conclude that the alter ego determination made as to defendants other than GWS was supported by the evidence.

The case must be remanded for a new trial only on the implied duty of good faith claim in accordance with this opinion. The judgments are set aside and the case is remanded for further proceedings in accordance with this opinion.

APPENDIX A-3

JANUARY TERM — February 12, 1986

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges.

W.C. AND KENNETH STREY, etc.,
Plaintiffs, Appellees, Cross-Appellants,

v.

HUNT INTERNATIONAL RESOURCES CORPORATION, etc., et al.,
Defendants, Appellants, Cross-Appellees.

Nos. 84-1344 and 84-1398

The Court has before it the petition for rehearing with suggestion for en banc consideration filed by appellees/cross-appellants W.C. and Kenneth Strey. Judge Breitenstein's death and Judge Doyle's assumption of inactive status has left only one judge of the original panel, Judge Seth, who could vote on the rehearing petition. Judge Seth has voted to deny rehearing.

In order to make a proper disposition of the rehearing motion, the court on its own motion submitted the petition for rehearing to a written poll of all the judges in regular active service on the court, except Judge Seymour

and Judge Moore, who did not participate. All judges voted to deny rehearing.

Therefore, by order of the en banc court, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 13, 1986, I served the within Petition for Writ of Certiorari in re: "Hunt International Resources Corporation v. W. C. & Kenneth Strey" in the United States Supreme Court, October Term 1985, No. .....;

on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

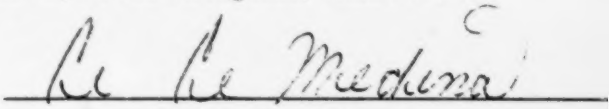
Mr. James H. O'Hagan, Mr. Edward J. Pluimer,
Mr. James B. Lynch
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, MN 55402

Mr. David S. Steefel, Mr. Richard L. Schrepferman
Holmes, Roberts & Owen
1700 Broadway, Suite 1800
Denver, CO 80290

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on May 13, 1986, at Los Angeles, California



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